Supreme Court, U.S.
FILED

03 - 905 OCT 14 2003

No.

In The
SUPREME COURT of the UNITED STATES

EUGENE A. RUTCH, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. The PA Superior Court's holding below eliminates the necessity of any reliability of blood testing in DUI cases and places the Defendant in the position of proving he is not-guilty. Section 1547(c) of the Pennsylvania Motor Vehicle Code is unconstitutional in that it admits BAC tests without reliability of testing safeguards in violation of F.R.E. 702. The Superior Court of Pennsylvania misapplied the Pennsylvania Supreme Court and the United States Supreme Court in refusing to follow the line of cases as to the reliability of the blood alcohol test as required by Frye v. United States 293 F.1013 (D.C. Cir. 1923), and Daubert v. Merrell Dow Pharmaceuticals 509 U.S. 579 (1993). The Panel merely states that the tests are admissible, *per se,* because of the Pennsylvania Vehicle Code. The cited Pa. Statute cannot supersede the United States Supreme Court's holding on the requirements for admissibility of a scientific test.

B. By the history of this case, it is clear that the right of cross-examination does not exist in Pennsylvania. The trial court below constantly, consistently and intentionally interfered with defense counsel's cross-examination of the police officers including but not limited to preventing inquiries into experience, training, credibility and opportunity to observe. These are the basic elements of cross-examination, but with the decisions below, a defendant virtually has lost all constitutional rights of confrontation and cross-examination.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OPINIONS BELOW

[X] For cases from state courts:

The opinion of the highest state court to review the merits (the Superior Court of Pennsylvania) appears, at Appendix A to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[x] is unpublished see 797 A.2d 1025 (2002)

The opinion of the State Trial Court appears at Appendix B to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[x] is unpublished.

The decision of the Pennsylvania State Supreme Court denying allocatur appears at Appendix C to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[x] is unpublished see 2003 Pa.Lexis 944

The decision of the Pennsylvania State Supreme Court denying rehearing appears at Appendix D to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[x] is unpublished.

JURISDICTION

[X] For cases from **state courts**:

The date on which the highest state court decided my case was

A copy of that decision appears at Appendix C.

[x] A timely petition for rehearing was thereafter denied on July 13, 2003, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S.Constitution, Amendment 6

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, ... , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and the have the assistance of counsel for his defense.

B. Federal Rule of Evidence 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

STATEMENT OF THE CASE

This action was commenced by criminal complaint in district justice office after the Defendant was arrested on September 12, 1999, for DUI and careless driving. The two counts of DUI were bound over, but the careless driving was dismissed by the issuing authority. Thereafter, a jury trial was held on June 9, 2000, whereby the Defendant was found guilty of two (2) counts of DUI. The Defendant appeals his Order of Sentence dated October 30, 2000.

On September 12, 1999, the Defendant, Eugene Anthony Rutch, at approximately 3:15 a.m., was traveling from the Borough of Lehighton into the Township of Mahoning, Carbon County. Past the township line and into Mahoning Township, the Defendant passed two vehicles along the passenger side of the road: a Lehighton Borough Police cruiser at a traffic stop with another vehicle. Because of the positioning of the vehicle, the Defendant down-shifted his vehicle and, moved leftward giving ample room to pass the vehicles. As he did, the police officer jumped as if he was startled, presumably by the loud noise of Mr. Rutch's van down-shifting. The officer, Officer Frace, then pursued and stopped Mr. Rutch and charged him with a DUI, while in Mahoning Township and outside his jurisdiction.

At the Preliminary Hearing, as issue was raised as to the jurisdiction of Officer Frace to make an arrest in Mahoning Township while on duty as a Lehighton Borough Police Officer. Officer Frace testified from the stand that he saw Mr. Rutch cross the township line and observed suspicious driving behaviors of Mr.

Rutch while he was still on the Lehighton Borough side of the line. The Defendant's photographs of the scene and the roadway prove that that fete was impossible because of the curvature of the road, and the fact the Mr. Frace would have to see through a house in order to see the line from where the first stop took place.

At the Preliminary Hearing, Mr. Rutch was prevented from exploring this area, and the court indicated that that was more proper for trial. At the trial, the trial court ended defense counsel's cross-examination of Mr. Frace during preliminary background questions, completely preventing any cross-examination from the actual stop in question. Despite the objections of defense counsel, and an offer of proof to the judge that defense counsel could prove that the office was lying, the court held that that line of questioning would be irrelevant.

Mr. Rutch was found guilty of two counts of DUI, and sentenced on October 31, 2000. The instant appeal filed on November 1, 2001 ensued thereafter.

REASONS FOR GRANTING THE PETITION

A. The court below creates a *presumption* that any BAC test is admissible, and correctly performed merely because the test was performed at an approved laboratory, unconstitutionally placing the presumption of guilt upon the Defendant.

With the instant case as precedent, Section 1547(c) of the Motor Vehicle Code, as long as blood tests in a DUI case are performed in an approved laboratory, by approved personnel, it makes no difference how the test is conducted, or if the results are reliable.

Now, the State Statute, i.e. the Pennsylvania Vehicle Code (75 Pa. C.S.A. §1547(c)) takes precedence over decisions of the Supreme Courts of Pennsylvania and the United States as to the admissibility of the results of scientific evidence.

There are criteria established by the United States Supreme Court, and adopted by the Pennsylvania Supreme Court which are to be employed to ascertain the reliability of the test itself, as discussed in detail in the attached Petition. The core of the test results, is the test itself, which was completely presumed accurate below, thereby eliminating all safeguards as to reliability. Further, this Defendant was denied the right of cross-examination into these areas, as will be discussed below.

Section 1547(c) of the Pennsylvania Vehicle Code truly stands in the way of all admissibility standards, discussed below, and is unconstitutional. Is it easier for the Commonwealth to conduct a DUI trial without

having to establish or defend the reliability of a blood test? Sure it is, but our constitutions were not designed to protect the rights of prosecutors! It may be the harder course to declare §1547(c) unconstitutional, or to subject it to the reliability standards outlined - but it is the only way to preserve the rights of the accused.

The Superior Court of Pennsylvania actually states that the said section of the Vehicle Code takes precedence over the decisions of the U.S. Supreme Court as to the admissibility of scientific test results. In other words, , this section of the PA Vehicle code removes all safeguards as to the reliability of scientific testing of blood results, merely because the subject of the test is blood/BAC. Further, as long as the test is performed in an approved lab, by approved personnel, it makes no difference HOW the test is conducted, or if the results are at all reliable. A total violation of the rights of all accused in this situation.

The Defendant asserts that a blood test, even under the PA vehicle code, must meet the standard established by Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) regarding the admissibility of evidence. In order to admit the testimony, and ultimate report of the chemist, the lower court must follow the doctrines of the PA Supreme Court in Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 664 A.2d 525 (1995) and the employment of Federal Rule of evidence 702 which requires scientific evidence to have a "general acceptance" in the relevant scientific community.

In 1993, the U.S. Supreme Court held that Frye, Id. was superseded in the Federal Courts by the adoption of Rule 702, Daubert v. Merrill Dow Pharmaceuticals, Inc. , 509 U.S. 579 (1993) which held that in determining whether a theory or technique has

scientific knowledge that will affect the trier of fact, so as to be the basis of admissible evidence to a key question to be answered, is ordinarily whether the theory or technique can be and has been tested.

Secondly, a pertinent consideration is whether the theory or technique has been subjected to peer review and publication.

Third, the court should ordinarily consider the known or potential rate of error of a particular scientific technique.

Fourth, the assessment of reliability permits, but does not require, explicit identification of a relevant scientific community as (a) widespread acceptance can be an important factor in ruling particular evidence admissible, and (b) a known technique that has been able to attract only minimal support within the scientific community may properly be viewed with skepticism.

Lastly, the inquiry is a flexible one, and the focus must be on principles and methodology, not on the conclusions that such principles and methodologies generate. Id. At 592-595.

The court extended Daubert, Id. In Kumho Tire Company, Ltd. v. Patrick Carmichael, et. al., 143 L.Ed.2d 238 (1999) to apply to the reliability standard established thereby to all scientific technical or other specialized matters within its scope. The court concluded that "... Daubert's general principles apply to the expert matters described in Rule 702. Most important is that Rule 702 requires a valid connection to the pertinent inquiry as a precondition to admissibility..." This case further went on to say that "... where such testimony's factual basis, data, principles, methods or their application are called

sufficiently into question, the trial judge must determine whether the testimony has a reliable basis..." Id. At 251.

As described in the below argument that the Defendant was denied the right of cross-examination, the trial court refused to allow the defendant to even question in this area.

Defendant only asks the privilege of presenting this argument to this Honorable Court.

B. There is no right of cross-examination of an arresting officer.

If this case is precedent, then a Defendant has no right to cross-examine his arresting officer about experience, training and credibility, or the opportunity to observe. This Defendant made an offer of proof (R.R. 218a) that the arresting officer lied under oath at the Preliminary Hearing as to his ability to see the Defendant from his vantage point. The officer's story drastically changed at the Omnibus Hearing, for if the first vantage point were maintained, this officer would have the ability to see through a building.

What the Lower Court has done, is to establish a profound presumption that the Affiant is totally credible, eliminates the need for the Court to consider the credibility of the Affiant, and again to place the burden on the Defendant to prove he is not guilty, handicapped with the inability to challenge his accuser.

A review of the record will not show that the defendant received a fair trial at all.

The confrontation clause of the U.S. Constitution provides that two types of protection for a criminal defendant: (1) the right to physically face those who testify against the defendant; and (2) the right to

conduct cross-examination. The right to confront one's accusers is satisfied if defense counsel receives wide lattitude at trial to question witnesses. Pa. V. Ritchie, 107 S.Ct. 989, 480 U.S. 39, 94 L.Ed. 2d 40 (1987).

A trial court may control the presentation of testimony as long as such control is not unduly restrictive or in violation of constitutional rights. U.S.ex. rel. Felten v. Rundle, 410 F.2d 1300, cert. denied 90 S.Ct. 1129, 397 U.S. 993 (3rd Cir. 1969).

This defendant was given no latitude on cross-examination, and only allowed to question the affiant for 26 pages of transcript, out of which 5 pages can be redacted for objection.

The defendant made an offer of proof to the trial court that the officer in fact lied at the preliminary hearing as to his vantage point which gave rise to the probable cause. His story drastically changed at the Omnibus Pre-Trial Hearing, and the trial court outright refused to allow the defendant to question this affiant on these issued before the jury. The Defendant was prohibited by the trial court from demonstrating that the arresting officer lied under oath.

Further, defense counsel was only part way through her prepared question, when the trial court removed the witness rom the stand without allowing the defendant to finish cross-examination. Of what questions the defendant was allowed to ask, the trial court sustained objections preventing the defendant from obtaining the answers to questions concerning:

a. where the officer was hired in the past;

b. policies of the police department concerning DUI detection;

c. instruction that may have been given to the officer for preparing a police report;

d. time-frame from the incident to the time the report was prepared;

e. contents of reports, and completeness thereof;

f. the trial court refused to allow the defendant to ask questions concerning the charge of driving under the influence without a requirement of a BAC because there was a BAC;

g. the officer discussing his testimony with the prosecutor;

h. the vantage point of the officer when he first observed the defendant, and where the officer was jurisdictionally.

After only 19 pages of background questions (denied by the trial court) the trial court gave the defendant a 5 minute warning as the questions began in the area of the actual events of the arrest. The defendant could not ask the officer if he could indicate what the defendant was drinking, who assisted the officer in performing the field sobriety tests, who placed the defendant into the police car (an issue as to jurisdiction), and all events after the defenadnt was placed into custody, taken to the hospital, statement the officer gave to other officers.

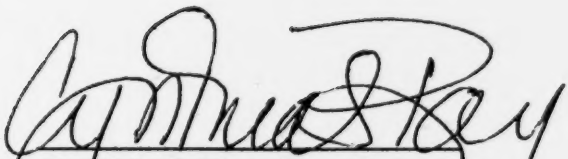
The trial court was more interested in reaching the guilty verdict, and stated that "we're going to finish this very simple DUI case today".

Defendant asks this Court to allow the opportunity to argue his case and to demonstrate the violation of his rights.

CONCLUSION

For the aforementioned reasons, the Petitioner respectfully requests this Honorable Court to grant the writ of certiorari.

RESPECTFULLY SUBMITTED:



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Date: 12-5-03

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APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
Appellee

V.

EUGENE ANTHONY RUTCH NO. 3056 EDA 2000

Appellant

Appeal from the Judgement of Sentence of October 30, 2000
In the Court of Common Pleas of Carbon County
Criminal Division at No. 84 CR 00

Before: McEWEN P.J.E., CERONE, P.J.E. and BECK J.

MEMORANDUM:

Appellant Eugene A. Rutch, convicted by a jury of two counts of driving under the influence (alcohol) (DUI)[1] brings this direct appeal from judgment of sentence, [2] raising eight issues of trial court error and a challenge to the jurisdiction of the arresting officer. For the reasons that follow, we affirm.

Appellant was arrested in the early morning hours of September 12, 1999, when he was traveling from the borough of Lehighton to the Township of Mahoning,

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[1]75 Pa.C.S.A.§3731

[2]Appellant received a fine of $300 and a prison sentence of thirty days to eighteen months.

Carbon County, He passed, along the passenger side of the road and on the shoulder of the road, a Lehighton police cruiser that had made a stop of another vehicle on Route 209, just over the line between Lehighton and Mahoning. The officer, Jeffrey Frace, then pursued appellant, who was driving erratically, and stopped him while in Mahoning. Noticing that appellant had a strong odor of alcohol and slurred speech, Frace requested police from Mahoning to assist in the arrest. Two additional officers, Steven Stout of the Mahoning department and Michael Svetik of the Lehighton force arrived in response to the call. Appellant refused to submit to filed sobriety tests and threatened the arresting officers. Subsequently, a test for blood alcohol content (BAC) at Gnaden Huetten Hospital in Lehighton showed that appellant's BAC was .258, approximately two and one-half ties the legal limit of .10.

Appellant first asserts that he was denied his right of confrontation under the United States and Pennsylvania constitutions because the court cut short his counsel's cross-examination of the arresting officer relating to his experience, his observations of appellant, the manner of the arrest, the time the blood was drawn, and inconsistencies between his statements at the preliminary hearing and trial. Appellant lists fourteen questions that counsel was kept from asking.

The trial court's memorandum opinion addressed the issue by stating that the exhaustive cross-examination of Frace (taking up twenty-six pages of transcript) included aimless and purposeless questions. The court has broad discretion to limiting or terminating questions that have no probative value and do not advance the inquiry into the truth. ***Commonwealth v. Morgan***, 559 Pa. 248, 739 A.2d 1033 (1999). Although appellant asserts that Frace lied at various times concerning exactly where he first saw appellant, our review leads to the conclusion that Frace's testimony was not consistent, and the court's limitation of the exhaustive questioning by counsel was not an abuse of

discretion.

Appellant next asserts that he was denied due discovery under Pa.R.Crim.P. 573 [3], and thereby severely prejudiced in his defense. He specifically names six subjects where, he claims, he should have received additional information. The trial court addressed this issue comprehensively in its memorandum opinion. The court explains that the Commonwealth turned over essentially its complete file. The items omitted were either not relevant (the officer's filed sobriety training, as no field sobriety test was administered) or not discoverable (the officer's prior DUI arrests, which the court deemed not admissible). Opinion, p.2. The court deemed other elements of the subpoena overly broad. The Commonwealth points out that appellant's accusation that his counsel first learned of earlier drafts of the affidavit of probable cause at trial is disproved by the record R.R. 21a-22a; 172a-181a. Appellant's assertion that the attorney representing the Commonwealth violated Pa.R.Crim.P. 107 [4] because he had no standing to file a motion to quash defense counsel's subpoenas for documents is belied by the fact that the attorney filing the motion was the attorney of record for the case.

Appellant's third allegation of error is the court's denial of a continuance that his counsel needed in order to prepare for trial. Appellant wanted to obtain an expert witness to refute the way the blood sample was handled. The court explains that it considered that appellant's several requests for continuances were made for the sole purpose of delay, and not in good faith. Appellant knew, since the time of his arrest, that blood analysis evidence would be part of the Commonwealth's case, but took no action to obtain his own witness in timely manner. The

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[3]Formerly rule 305

[4]Formerly rule 9016.

trial court has broad discretion to grant or deny a request for continuance and will not be reversed absent a showing of abuse of discretion. ***Commonwealth v. Ah Thank Lee,*** 566 A.2d 1205 (Pa. Super. 1989).

Appellant next asserts that he was improperly sentenced because the sentence he received was not the one recommended in the pre-sentence report, and because the sentence fell in the aggravated range and the court did not give adequate reasons for imposing it. The trial court explains that appellant did not preserve the sentencing issue by raising it at the time the sentence was imposed or in a motion to reconsider or modify sentence. Neither does appellant present a substantial question that the sentence is inappropriate under the sentencing code. The issue is therefore waived. ***Commonwealth v. Petaccio,*** 764 A.2d 582 (Pa. Super. 2000). Appellant's sentence is within the guidelines, and a bald allegation of excessiveness does not raise a substantial question for appellate review. ***Commonwealth v. Wagner,*** 702 A.2d 1084 (Pa. Super. 1997). In addition, appellant does not include in his brief a concise statement of reasons relied on for appeal concerning the discretionary aspect of his sentence, as required by ***Commonwealth v. Tuladziecki,*** 513 Pa. 508, 522 A.2d 17 (1987) and its progeny. For all these reasons, appellant's challenge to his sentence is without merit.

Appellant's fifth charge of error is that the trial court showed extreme bias against him. To substantiate his charge, appellant repeats the allegations of limiting cross-examination, denial of discovery, denial of motions for continuance, unfair sentencing, and "overall conduct toward defendant" (including several other rulings concerning the conduct of the trial).

In addition to the charges of bias that are raised as separate issues and discussed above, appellant's brief includes the following litany:

- limiting questioning during the omnibus hearing prior to trial;

- granting Commonwealth objections to relevance in defense's questions;

- instructing counsel on how to ask relevant questions;

- admonishing counsel for receiving a note immediately before jury selection;

- asking counsel how long the defense would take;

- unfair rulings on requests for transcripts;

- unfair rulings on discovery;

- denial of bail request;

- denial of motion for supersedeas;

- denial of motion for a ***Frye*** hearing on the evidence.

Appellant's brief, at 35-38. On the charge that the court unfairly denied release on bail pending appeal, the court's opinion explains that appellant did not file a written request for the next day. Opinion, p.11. To summarize, our review of the record indicates that appellant received a fair trial, and that his conviction arose from the evidence against him and not from unfairness on the part of the court. We decline to find prejudice in the court's rulings.

Appellant's sixth claim of error is that he was denied a fair trial because the court denied his requested jury instructions. [5] Defense counsel requested the instruction "false in one, false in all" relating to an alleged lie by the arresting officer about his ability to see appellant crossing the borough-township line. We begin by taking note that we have concluded that there was no lie in the officer's testimony, so the allegation of error has no underlying merit. Even more compelling is the court's

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Appellant's brief refers us to p. 508a of the Reproduced Record for the content of the proposed instruction. However, p. 508a is not included in the reproduced record. The request for the instruction appears at N.T., 6/9/2000, at 167.

memorandum opinion responding to this charge by noting that counsel failed to object to the charge after it was given, and, under Pa.R.Crim.P. 647(B)[6](footnote 6), the issue is therefore waived. ***See Commonwealth v. Edmondson,*** 553 Pa. 160, 718 A.2d 751 (1998)) (failure to lodge a timely objection to the trial court's jury instruction results in waiver of the issue for the purposes of appeal).

Appellant next attempts to establish trial court error in the admission of the BAC evidence without first establishing the reliability of the test and the chain of custody. He first alleges a violation of the requirements for reliability required by ***Daubert v. Merrell Dow Pharmaceuticals,*** 509 U.S. 579 (1993). Appellant's argument fails to take note that ***Daubert*** criteria are not necessary in this instance because of the admissibility of BAC in a charge of a § 3731 violation is established by statute. 75 Pa.C.S.A. § 1547(c) provides that the test result may be admitted into evidence if performed by a laboratory licensed and approved by the Department of Health or, as in the instant case, by a Pennsylvania State Police criminal laboratory. This issue is without merit.

Appellant also challenges the chain of custody of the blood sample, alleging that the Commonwealth failed to produce all the individuals who may have handled the sample and that the sample was improperly preserved. Appellant relies on ***Commonwealth v. Hudson,*** 489 Pa. 620, 414 A.2d 1381 (1980) which does not support his argument. That case states that the Commonwealth need not establish the sanctity of its exhibits. All that is required is a reasonable inference that the identity and condition of the exhibit remains unimpaired until surrendered to the court. At the trial it was adduced that the officer who saw the bolld being drawn from appellant's arm took possession of the sample, placed it in an appropriate container for

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[6] Formerly rule 1119.

mailing, and kept in the officer's locked car until it was sent by certified mail to the laboratory. A forensic scientist from the laboratory received the sample in its sealed container, opened it and performed the tests himself. N.T. 6/9/2000, at 50-91. This issue, too, is without merit.

Appellant next alleges that the court improperly denied his omnibus pre-trial motions. This general allegation focuses on a challenge to the officer's probable cause for the vehicle stop and the officer's jurisdiction to proceed as he did. These issues were decided adversely to appellant at the pre-trial hearing. Appellant attempted to raise these issues again, before the jury, inclosing argument. The court correctly explains that these questions should not have been injected into counsel's closing argument as they were questions of law, not fact, and not within the jury's province.

Appellant's final issue is that officer Frace, as a police office of Lehighton Borough, had no jurisdiction to transport him to the hospital in Mahoning Township for the BAC test. He argues that the transfer violated the Statewide Municipal Police Act, 42 Pa.C.S.A. § 8953 (the Act). As the Commonwealth points out, Officer Frace, while on duty at the time in question for Lehighton, was also a duly employed office of Mahoning, where he possessed full police powers. Additionally, the Act specifically grants the power and authority to enforce laws of the Commonwealth on any duly employed municipal officer who is within the Commonwealth but beyond his territorial jurisdiction. ***See Commonwealth v. Arroyo,*** 686, A.2d 1353 (Pa. Super. 1996) (stop of a vehicle by police in official car with roof lights on while outside the officer's primary jurisdiction is not a violation of the Act). Frace was in uniform and driving a marked police cruiser with the roof lights activated. He therefore had authority to carry out official business in Mahoning, including the transfer of appellant, who showed clear signs of intoxication and refused to perform the field sobriety tests, to the hospital.

This issue is also without merit.

Finding no merit in appellant's numerous allegations of error, we affirm judgment of sentence.

Judgment of sentence affirmed.

CERONE, P.J.E. concurs in the result

Judgment Entered.

s/ David A. Szewczak
Prothonotary

Date: January 18, 2002

APPENDIX B

In the Court of Common Pleas of Carbon County,
Pennsylvania
Criminal Division
Commonwealth of Pennsylvania

Vs. No. 084 CR 00

Eugene Anthony Rutch, Defendant

David W. Addy, Esquire Counsel for Commonwealth
Assistant District Attorney
Cynthia S. Ray, Esquire Counsel for Defendant

MEMORANDUM OPINION

LAVELLE, S.J. - March 26th, 2001

Eugene Anthony Rutch ("Rutch") has appealed to the Superior Court his convistion, following a trial by jury, of driving under the influence of alchohol [7] and driving while his blood alcohol was .10% or greater.[8]

Rutch has filed a nine page R.A.P. 1925(b) statement in which he raises twenty-four separate assignments of error in sixteen numbered paragraphs, several of these containing numerous sub-paragraphs. His statement does not comply with the rule because it is not concise and it contains extensive argument as well as averments of fact which are not in the record. Nonetheless, we will address Rutch's arguments *seriatim*, although not necessarily in the same order as he presented them.

1. Discovery Issues

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[7] 75 Pa.C.S. §3731(a)(1)

[8] 75 Pa.C.S. §3731(a)(4)(i)

(Matters Complained of on Appeal, Items 1 & 3)

Rutch first complains that he was unfairly prejudiced by our denial, pre-trial, of his motions for compulsory discovery. However, it is clear, as it was when we originally heard argument on his motion for discovery, that the Commonwealth supplied Rutch with essentially its entire file. Those items which we denied were clearly either not relevant or not discoverable. These latter included evidence relating to the arresting officer's field sobriety training (we deemed the evidence not relevant because no field sobriety tests were conducted on the defendant) and information relating to the arresting officer's prior DUI arrests (we did not consider this evidence to e material, relevant or admissible). We quashed Rutch's subpoenas because they violated Pa.R.Crim.P. No. 9016 in that they were overly broad and called for police files to be delivered to an attorney's private office.

2. Denial of Defendant's Motion to Extend Deadlines

(Matters Complained of on Appeal, Item 2)

Rutch next claims that we erred in denying his motion to extend deadlines. We denied this motion because we determined that Rutch had already received full and complete discovery. Accordingly, we concluded that the motion was not made in good faith, but rather was made for the sole purpose of delaying these proceedings. In so ruling, we exercised our sound discretion in controlling the Court's calendar.

3. Denial of Rutch's Omnibus Pre-Trial Motions

(Matters Complained of on Appeal, Items 4 & 9)

Prior to trial, Rutch filed an Omnibus Pre-Trial Motion under Pa.R.Crim.P. No. 306 raising a plethora of issues relating to suppression of evidence, the legality of his detention and arrest, and the Commonwealth's alleged failure to establish a prima facia case. We dealth with these issues at length in our Order denying Rutch's motion

entered on May 16, 2000, and see no need to expand on our reasoning here, except to note that we still believe, as we did then, that Rutch's motions were totally devoid of merit. For the Court's convenience, a copy of our earlier Order is attached to this Opinion.

4. Denial of Requested Continuance of Pre-Trial Conference

(Matters Complained of on Appeal, Item 5)

Rutch also complains that we erred in denying his request for continuance of the per-trial conference scheduled for May 19, 2000, which continuance application was filed two days prior to the scheduled event. The reasons stated in the continuance application were "record incomplete" and "expert need [sic] for test of blood". We deemed these reasons insufficient because the record was not incomplete and there was no demonstrated need for an expert in order to prepare for a pre-trial conference. Moreover, Defendant was aware, since the time of his arrest, that blood analysis evidence would be part of the Commonwealth's case and yet he apparently took no action to retain an expert witness of his own.

5. Denial of Request for Trial Continuance

(Matters Complained of on Appeal, Items 7 & 8)

Rutch also claims that we erred in denying his request for a trial continuance. It is clear that a trial court has wide discretion over continuance requests and that denial of a continuance will not be reversed absent a palpable and manifest abuse of the court's discretion: Commonwealth v. Lee, 566 A.2d 1205 (Pa.Super., 1989).

It is equally clear that a bald allegation that counsel needs more time to prepare for trial in itself is insufficient: id. We believed at the time, as we do now, that Rutch's successive continuance requests, made at practically every stage of these proceedings, were done solely for the purposes of delay and not for any real or even perceived necessity for more trial preparation time. This case was a rather normal DUI prosecution which did not involve any

factual or legal issues of unusual complexity.

6. Denial of Request for Transcript

(Matters Complained of on Appeal, Items 6 & 15)

Rutch claims he was prejudiced because we denied his request for a transcript of the Omnibus Pre-Trial Hearing. Rutch's counsel filed this request late in the afternoon of Thursday, June 1, 2000, knowing that the trial was scheduled to begin the following Monday morning. We properly denied this request as untimely filed as it would have been physically impossible for the court reporter to complete the transcription prior to the day of trial. [9]

Moreover, Rutch has failed to allege in what way he was prejudiced by not having this transcript available at the time of trial.

7. Alleged Denial of Right of Cross-Examination

(Matters Complained of on Appeal, Item 10)

Rutch next claims that he was denied the right to conront and cross-examine various witnesses, including the arresting officer. In particular, he complains that we improperly sustained the Commonwealth objections and ended counsel's cross-examination of the arresting officer, Jeffrey Frace, when she was only part way through her prepared questions.

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The transcript of this hearing was filed on January 30, 2001. We also note that on November 2, 2000, following the filing of the instant appeal, we ordered the court reporter to transcribe the notes of trial upon defendant paying the cost thereof. On January 12, 2001, we discovered that Defendant, who has been represented throughout these entire proceedings by private counsel, had still not paid the cost of the transcript, and on that date we ordered the county to pay same and assess the cost against Defendant as part of the record costs of these proceedings.

The record reflects that on no less than four separate occasions during defense counsel's exhausting cross-examination of Officer Frace, which comprises twenty-six (26) pages of the trail transcript (NT, 25-50), the Court cautioned counsel to begin asking relevant questions. Her cross-examination consisted of aimless and purposeless questions dwelling on irelevant minutiae such as:

"WHO ASKED MR. RUTCH TO PERFORM FIELD SOBRIETY TESTS?"

"DID YOU ASSIST IN THAT REQUEST?"

"HOW MANY FIELD SOBRIETY TESTS WERE ASKED OF MR. RUTCH?"

"WHO PLACED MR. RUTCH UNDER ARREST?"

"WHO HANDCUFFED MR. RUTCH?"

"WHO PLACED MR. RUTCH INTO THE CRUISER", etc (NT 49-50)

These questions served no legitimate trial purpose, had no probative value and did nothing to advance the truth-seeking process. The inquiry concerning field sobriety tests was particularly vexing since it had been established early in the trial that no field sobriety tests were submitted to by Mr. Rutch. We observed that the jury was becoming restless, impatient and annoyed by counsel's line of questioning. These questions were properly objected to by the Commonwealth and we properly sustained those objections. When it became obvious that counsel had no relevant or probative questions to ask, we terminated the cross-examination and excused the witness.

Defense counsel pursued substantially the same tack in her cross-examination of Officer Steven Stout: See e.g., NT, 71-74.

A trial court has broad discretion to limit the parameters of cross-examination: Com. V. Cessna, 537 A.2d 834 (Pa.Super., 1988), and normally cross-examination is confined to matters pursued on direct examination. A defendant's constitutional right to confront

and cross-examine adverse witnesses, however, is not unlimited, and where, as here, that rights is abused, the trial judge has a duty to terminate questioning where it has no probative value and does not serve to advance the inquiry into the truth: Commonwealth v. Brown, 414 A.2d 70 (Pa., 1980).

8. Objections to Charge

(Matters Complained of on Appeal, Items 11 & 14)

Rutch alleges that we erred in failing to grant his proposed jury instructions and that we further erred in instructing the jury that the legality of the traffic stop had already been determined and that it was not a question for the jury. The legality of the stop was, of course, purely a question of law and it had already been resolved, adversely to Rutch, in pre-trial motions. We were compelled to instruct the jury not to consider this question because of Rutch's improper attempts to inject this issue into the trial, particularly during defense counsel's closing argument. Further, our review of the charge indicates that it was fair and adequate in all respects and substantially in accordance with the Standard Criminal Jury Instructions.

We also note that counsel failed to object to the charge after it was given and any objections thereto are, accordingly, waived and cannot now be raised for the first time on appeal: Pa.R.Crim. P. 1119.

9. Alleged Sentencing Errors

(Matters Complained of on Appeal, Items 11 & 14

Rutch complains that we imposed a sentence in excess of that recommended in the Probation Office's Pre-Sentence Investigation Report. In his words, "[t]he Court seemed to punish the Defendant for not accepting the official version of the incident . . . and maintaining his innocence."

Rutch's claim, of course, is a challenge to the discretionary aspects of his sentence, for which the right to

appeal is not absolute: Commonwealth v. Hoag, 665 A.2d 1212 (Pa.Super., 1995). In order to prevail, he must establish (1) that the issue was properly preserved at sentencing or in a motion to reconsider or modify sentence, and (2) that there is a substantial question that the sentence appealed from is not appropriate under the sentencing code: Commonwealth v. Petaccio, 2000 WL 1823116 (Pa.Super., 2000).Since Rutch raised no objection at sentencing and did not file a post-sentence motion challenging the discretionary aspects of his sentence, his claim is deemed waived: Commonwealth v. Losch, 535 A.2d 115 (Pa.Super., 1987). Moreover, he failed to raise a substantial question on appeal since his sentence was within the sentencing guidelines and the reasons for the sentence were stated on the record. A bald allegation of excessiveness does not raise a substantial question so as to permit appellate review where the sentence is within the statutory limits: Commonwealth v. Jones, 613 A.2d 587 (Pa.Super., 1992).

Rutch's final argument relating to sentencing is that the Court imporperly ordered him to install an interlock device on his vehicle, since the conviction preceded the effective date of the interlock law. Rutch is quite correct on this point. However, in his Rule 1925 statement he neglects to mention that the court discovered its own error and omitted the interlock requirement in the written Order of Sentence filed in this matter on October 31, 2000. Accordingly, Rutch was in no manner was prejudiced at the sentencing hearing. (Matters Complained of on Appeal, Item 12)

10. Allegations of Bias

(Matters Complained of on Appeal, Item 13)

Rutch's final assignment if error is that the Court "showed bias towards the defendant throughout the entire

proceeding."[10] As "illustrations of the court bias [sic]", Rutch again cites our denial of his transcript request, requests for discovery, and continuance requests, all of which we have dealt with earlier on bail pending appeal as a manifestation of theCourt's bias. However, Rutch did not file a written request for bail until after the sentencing hearing on October 30, 2000. We granted that request the following day, contingent on his perfection of an appeal to the Superior Court. Rutch filed his appeal on November 1, 2000.

Bald allegations of bias or prejudice, without a clear showing of actual prejudice on the record, are insufficient to state a ground for relief. The party must demonstrate that the alleged bias of the judge infected the jury or otherwise deprived him of a fair trial: Commonwealth v. Hewett, 51 A.2d 1980 (Pa.Super., 1988). No such showing has been made in the instant case.

A careful review of the record discloses that Rutch received a fair trial before an impartial and unbiased judge and jury. That he is unhappy with the outcome of that trial is understandable. However, the evidence against him was overwhelming and it was that evidence which convicted him, not any imagined bias or prejudice on the part of the Court.

For the foregoing reasons, we believe that the judgment of sentence should be affirmed

BY THE COURT:

/s/ John P. Lavelle
S.J.

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We assume that Rutch intended to say that we showed "bias" in favor of the prosecution and "prejudice" against the defendant.

APPENDIX C

In the Supreme Court of Pennsylvania
Middle District

Commonwealth of Pennsylvania

Vs. No. 278 MAL 2002

Eugene Anthony Rutch, Defendant

ORDER

PER CURIAM

AND NOW, this 3rd day od June, 2003, the Petition for Allowance of Appeal is hereby DENIED.

APPENDIX D

In the Supreme Court of Pennsylvania
Middle District

Commonwealth of Pennsylvania

Vs. No. 278 MAL 2002

Eugene Anthony Rutch, Defendant

ORDER

PER CURIAM

AND NOW, this 16th day of July, 2003, the Application for Reconsideration of Petition for Allowance of Appeal is hereby DENIED.